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No. 88-1783

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FRANK ASTA, *et al.*,
Petitioners,
v.
STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF OF PETITIONERS

ROBERT M. STEPHENSON
COTSIRILOS, CROWLEY, STEPHENSON, TIGHE & STREICKER, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
(312) 263-0345

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
LOREEN M. MARCIL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000
Counsel for Petitioners

* Counsel of Record

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Respondent concedes, as it must, that the issue presented by petitioners is an "important" one (Opp. 4, n.1) on which the state courts have reached conflicting results. Nevertheless, respondent insists that it should be permitted to impose the burden of a criminal prosecution upon petitioners before this Court decides whether such a prosecution is constitutionally permissible. None of the reasons proffered by respondent for denying the petition supports such a manifestly unjust result.

1. Respondent's primary argument is that certiorari should be denied because the factual issue of whether petitioners were "in compliance with OSHA standards" (Opp. 5) is yet unresolved. But at the same time, the State of Illinois concedes that, as far as its prosecution of petitioners is concerned, *petitioners' compliance with*

OSHA standards is legally irrelevant. Respondent's Opposition makes clear that, as the indictment indicated, petitioners' criminal liability under the unarticulated Illinois standards will be decided completely apart from the comprehensive federal regulatory framework. Opp. 5, n.2 (OSHA violations are "not material" to this prosecution). Respondent will not have the burden of proving that petitioners were in violation of OSHA as part of its affirmative case. Moreover, compliance with OSHA will not be a defense. Indeed, it is clear from the State's position that the prosecutors will object vigorously to any proposed jury instruction regarding OSHA compliance as a defense. Thus, there is no reason for this Court to await development of a "factual" question that the State concedes to be wholly irrelevant; this case is appropriate for review now.[1]

2. Respondent makes some effort to distinguish the lower court opinions which conflict with the decision of the Illinois Supreme Court. Respondent asserts that "most of the decisions" are "not of the type to create a clear difference of opinion." (Opp. 11.) Respondent's ar-

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[1] Despite respondent's repeated assertions that "undeveloped facts" prevent this case from being appropriate for review at this time, respondent does not even include a Statement of Facts in its brief. The only "facts" are relegated to an Appendix to respondent's brief, in an obvious attempt to circumvent this Court's rules concerning page limitations. Moreover, the Appendix was reproduced verbatim from the Statement of Facts contained in respondent's brief in the Illinois Supreme Court. It is based on grand jury testimony which was *not part of the record on appeal.* Petitioners moved to strike it on that ground, but the Illinois Supreme Court never ruled on petitioners' motion, most likely because the specific factual discussion is wholly irrelevant to a proper disposition of the preemption issue.

In any event, for a more objective and accurate summary of the facts underlying this case, petitioners refer the Court to the brief filed by *amicus curiae* the Synthetic Organic Chemical Manufacturers Association in support of the petition.

gument in this regard essentially involves a "domino theory" of legal reasoning. Respondent suggests that if the conflicting decisions had been rendered *after* the decision of the Illinois Supreme Court (rather than after the contrary decision of the Appellate Court of Illinois), the outcomes would have been different because of the "heavy reliance" those courts placed upon the appellate court's decision. For example, with respect to the conflicting Texas decision, respondent states that the Texas court "bottomed its opinion upon the Illinois appellate court's subsequently reversed opinion in the instant case, so its precedential value is questionable." Opp. 7. Similarly, with respect to a conflicting Colorado precedent, the respondent states that "it appears [the Colorado case] would have been decided differently if the Colorado judge had waited for the opinion [below]." Opp. 8.

There is no basis for these assertions. Neither the Texas nor the Colorado court was bound by the Illinois appellate court's decision. Instead, they adopted its reasoning because they found it to be a persuasive interpretation of Congress' intent in enacting the OSH Act. Just as the Wisconsin appellate court was unpersuaded to follow the Illinois appellate court's opinion in this case, *see* Opp. 27, n.32, the courts in Texas and Colorado are not likely to abandon their holdings based on the legal reasoning employed by the court below. They represent the law of Texas and Colorado, and not of Illinois. Thus, the subsequent reversal by the Illinois Supreme Court in no way diminishes the real conflict in the decisions in the various states and does nothing to eliminate the unfairness inherent in a situation in which residents in Texas, Colorado and New York cannot be prosecuted for precisely the same conduct for which petitioners have been indicted and will stand trial under the holding below. That conflict in decisions on an issue as

"important" as the one presented by petitioners requires resolution by this Court.[2]

3. Respondent also argues that certiorari should be denied because the court below was correct on the merits. Its fundamental argument is that "the prosecution of criminal offenses under state criminal laws of general application cannot be preempted by OSHA because such prosecutions do not equate with the enforcement of health and safety 'standards' . . . ." Opp. 18. But this type of argument already has been rejected by this Court. "[I]t is well settled that the general applicability of a state cause of action is not sufficient to exempt it from preemption." *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 300 (1977). Moreover, "it is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern [in preemption analysis]." *Amalgamated Ass'n of Street, Electric & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971); see Pet. 12-13 ("this Court consistently has rejected" the argument that traditional preemption doctrine does not apply to " 'general' criminal laws").

The plain language of the OSH Act makes clear that on an "issue with respect to which a Federal standard has been promulgated," state action is permitted only if it is pursuant to a state plan that has been approved by the Secretary of Labor. 29 U.S.C. § 667(b); *see* Pet. 14. That implementing and administering such a plan may be difficult or expensive, as respondent complains (Opp. 9), does not bear upon Congress' intent in this regard.

Focusing on the real impact of the state's proposed conduct, there is no question that criminal prosecutions

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[2] The decision of the Michigan Court of Appeals in *People v. Hegedus*, 169 Mich. App. 62, 425 N.W.2d 729 (1988), was reversed by the Michigan Supreme Court on July 3, 1989 (No. 83601). Although the decision eliminates the conflict between Michigan and Illinois it in no way detracts from the conflict that otherwise exists with the other state courts.

based on workplace conditions will have the effect of setting "standards," [3] which is a matter explicitly committed to the exclusive authority of OSHA. The central threat that such a prosecution poses (both to employers and to the comprehensive scheme of OSHA regulation) lies in the fact that such "standards" will be developed and articulated only on an *ad hoc* basis. Indeed, allowing such standards to be set by *post hoc* criminal prosecution—rather than by federal regulation based on available scientific evidence—invites the very localized and politicized decisionmaking that Congress, in enacting OSHA, sought to eliminate. (Pet. 16-18.) [4]

Respondent's suggestion that "lack of serious criminal penalties" evidences congressional intent not to preempt state criminal prosecutions for OSHA-regulated conduct also fails, because it directly contradicts the legislative history of the OSH Act. As explained in the petition, Congress carefully considered and debated the question of appropriate penalties for conduct prohibited by the OSH Act and concluded that criminal penalties would be provided only for those willful violations that result in death. (Pet. 5 n.2.) Thus, the lack of other criminal penalties was based on Congress' determination that the purposes of the Act would be best achieved through " 'preventative rather than punitive means'." *Id.* at 4.

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[3] The indictment itself is based on the theory of a breach of the "duty" to provide a safe workplace. (Pet. 15.) The question which will be left entirely to the discretion of the jury in this case—rather than to the Department of Labor under OSHA—is what "standard of care" is imposed under that "duty."

[4] As a secondary position, respondent states that the problem of imposing workplace standards through criminal prosecutions is not particularly troublesome because Congress, in enacting OSHA, sought only to impose "minimum" standards. (Opp. 16-17.) That is a demonstrably incorrect statement of Congress' intent as the language, structure and legislative history of the OSH Act make clear. (Pet. 3-7, 13-18.) The only support that respondent cites for this assertion is the decision of the Illinois Supreme Court in this case and one other state court case. (Opp. 16.)

4. At bottom, the State's extreme view of OSHA preemption, *viz.*, that petitioners may be imprisoned or fined under state "standards" for conditions in the workplace in compliance with comprehensive OSHA standards, demands review by this Court.[5] (Pet. 10-11.) The State's argument that federal standards are irrelevant, which was adopted by the Illinois Supreme Court, represents a serious misapplication of this Court's preemption doctrine and conflicts with a number of other state court decisions on this issue. (Pet. 13-15, 18-22.) Moreover, such a flagrant disregard of federal authority threatens to eliminate the uniformity and balance that Congress deemed to be essential to maintaining safe and uniform workplace conditions.[6] (Pet. 15-18.) Its effects are and will continue to be felt not only by defendants such as

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[5] Respondent suggests that petitioners are seeking to use OSHA as a shield to immunize employers for all actions that occur in the workplace. In so doing, respondent grossly mischaracterizes petitioners' argument. Petitioners contend simply that OSHA preempts state criminal prosecutions for matters actually regulated by OSHA. If the conduct or conditions at issue are not regulated by OSHA, then prosecution is not preempted. Petitioners have never contended, as respondent suggests, that the OSH Act "expressly precludes all state action in the workplace." (Opp. 20.)

There is also no basis for the State's belated assertion that many of the charges against petitioners may involve unregulated substances. The State has never made that argument previously and the State's assertion is supported by absolutely nothing in the record. *See* Opp. 12 (citing nothing to support this claim). This is clearly a desperate effort to avoid having the case reviewed by this Court on the present record, which shows that petitioners have complied with OSHA. In any event this issue is a complete red herring because nothing in any decision by this Court concerning the questions presented by petitioners would preclude the State from seeking to reindict petitioners if it believes it can convince a grand jury that substances not regulated by OSHA in fact caused injuries to employees.

[6] *Amici curiae*, the Chamber of Commerce of the United States, *et al.*, describe the "regulatory chaos" portended by the decision below in their brief filed in support of the petition. (Br. 5.)

petitioners but by the Department of Labor, as well. In sum, there is no reason to delay a decision by this Court on this concededly important and recurring issue and, just as important, notions of fundamental fairness to the individual defendants argue forcefully for immediate review.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. STEPHENSON
COTSIRILOS, CROWLEY, STEPHENSON, TIGHE & STREICKER, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
(312) 263-0345

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CARTER G. PHILLIPS
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